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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-279

CHARLES J. PILUSO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF

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THERE IS A DIRECT AND UNEQUIVOCAL CONFLICT BETWEEN THE SECOND CIRCUIT IN U.S. v. BRECHT, 540 F.2d 45 AND THE FOURTH CIRCUIT IN U.S. v. PILUSO, 511 F.2d 1953, AND A CONFLICT WITHIN THE FIFTH CIRCUIT IN U.S. v. PERRIN, 580 F.2d 730 (1978) AS TO WHETHER COMMERCIAL BRIBERY CAN RAISE TRAVEL ACT JURISDICTION WHICH SHOULD BE RESOLVED BY THIS COURT AT THIS TIME

In the Opposition filed by the Solicitor General the Government seeks to dilute the sharpness of the conflict between the Fourth Circuit and the Second Circuit in their divergent constructions of the Travel Act by urging that in the instant case the indictment alleged

in addition to commercial bribery, Section 180 of the New York Penal Code, which was common to both *U.S.* v. *Brecht,* supra, and *U.S.* v. *Piluso,* supra, a conflict of interest statute, Title 18, Section 215, which was not before the Second Circuit in *U.S.* v. *Brecht,* supra. At Page 4 of the Opposition to the Petition for Certiorari, it states:

> Petitioner's argument that violations of 18 USC 215 are not covered by the Travel Act (Pet. 21) fares no better. Petitioner can draw no support for this contention from Brecht, which did not involve Section 215, and Petitioner cites no authority for his construction of the statute.

The instant indictment alleged Section 180 of the New York Penal Code, commercial bribery, and Section 215 of Title 18, a conflict of interest statute, as the unlawful activity raising Travel Act jurisdiction.

The instant case is the only reported case where Section 215 of Title 18 was ever postulated as a basis of unlawful activity giving jurisdiction to the Travel Act. Contrary to the argument in the Opposition, Pages 6 and 7, Section 215 of Title 18 is a conflict of interest statute and not a bribery statute. It is included in the U.S. Code under Chapter 11 entitled "Bribery, Graft, and Conflicts of Interest." Section 215 makes unlawful only receipt of commissions or gifts by officers or employees of banks insured by the Federal Deposit Insurance Corporation. Of the twenty-one sections codified in Chapter 11 of Title 18, twelve deal with the giving of things of value to influence the actions of recipients. It is signifiant that of these twelve statutes there are only two in which only the receiving of a commission or gift violates the law. 18 USC, Sections 215 and 217. Of the others, nine proscribe the giving as

well as the receiving. 18 USC, Sections 201, 203, 209-214 and 216, and one (USC, Section 224) makes the giving only unlawful. Section 215 is directed exclusively to benefits which a bank officer "by reason of his peculiar position of * * * influence or trust exacts from another." See *Razette* v. *United States,* 199 F.2d 44 (6th Cir.) cert. denied 344 U.S. 904 (1952). The legislative history of the Federal Reserve Act of 1913, from which 18 USC Section 215 is derived, reveals that this provision was aimed only at the bank officers. "In this section it is sought * * * to end the illegitimate practice whereby officers of national banks have heretofore profited at the expense of borrowers by charging a commission or brokerage for the obtaining of loans." House Report No. 69, Sixty-third Congress, First Session 72 (1913).

Section 215 of Title 18 may be analogized to statutes making extortion illegal. It has never been suggested that the victim of the extortion is guilty of criminal conduct because he has capitulated to the extortionist's demand. It would be inconceivable to suggest that by combining Section 1952 or Section 2 of Title 18 with the extortion statutes of the Federal Government 18 USC 872 891-894 or of the states persons who utilize the facilities of interstate commerce and made payments to extortionists thereby committed crimes against the United States. The legislative history of Title 18, Section 215 shows that it was designed to prohibit officers of federally insured banks from exacting fees or commissions from parties applying for loans, who many times were in great need and, like the individual being extorted, were subject to involuntary payments.

The absence of any judicial authority other than the instant case plus the legislative history of Section 215 of Title 18 establishes that it is not a statute which can invoke the jurisdiction of the Travel Act. *Its presence, therefore, in this indictment is irrelevant to the direct conflict between the Second Circuit in U.S.* v. *Brecht, supra, and the Fourth Circuit in U.S.* v. *Piluso, supra, that commercial bribery under Section 180 of the New York Penal Code is a basis for jurisdiction under the Travel Act.*

The United States Court of Appeals for the Fourth Circuit recognized the sharpness of its conflict with the Second Circuit in the instant case when it stated (Pet. App. 3A):

> In January of 1977 Pomponio petitioned the Supreme Court for certiorari, contending, inter alia, that his case *presented a clear and unequivocal conflict between two courts of appeal on the question of statutory construction.*

At Page 4 of the Opposition the United States urges that nothing has happened since the denial of certiorari in Pomponio, which presented the conflict, that would warrant the Court in granting certiorari at this time. This Court has repeatedly stated that a denial of certiorari at some point in time neither reflects agreement by this court with the lower court and does not even imply an expression of agreement with respect to the merits of the case. *U.S.* v. *Shubert,* 348 U.S. 222, 75 S.Ct. 277.

However, contrary to the Government Opposition at Page 4, matters have not remained static since this Court's denial of certiorari in *U.S.* v. *Pomponio.* The Government refers, in its Opposition at Page 6, to the

recent decision of the Fifth Circuit in *United States* v. *Perrin,* 580 F.2d 730 (5th Cir. 1978). With respect to this decision, the Government quotes from the opinion:

> The language of the Travel Act * * * includes private persons as well as public officials.

The Government failed to state in its Opposition that *Perrin* v. *United States,* supra, was a split decision, with the dissenting Judge Rubin siding with the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *Brecht,* supra, and adopting all of the arguments advanced in the original petition filed in this Court with respect to the construction of the Travel Act. We call to the Court's attention specifically the language of Judge Rubin dissenting in *United States* v. *Perrin,* supra, when he stated:

> One of the classic limitations in the enforcement of criminal law, which is embedded implicitly in the Due Process Clause of the Constitution, is summed up in the phrase. "Nulla poena sine lege" —there should be no punishment without prior statutory mandate. My brethren require four pages of dialectic to determine that the unadorned word "bribery" in the Travel Act provides authority for the punishment by the Federal Government of "commercial bribery." The layman would scarcely choose so uncertain a route to define a clear proscription, nor indeed would the Second Circuit, United States v. Brecht, 2 Cir. 1976, 540 F.2d 45, cert. denied, 1977, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573.

The dissenting judge also stated:

> Let me place a few grains on the side of the scale counterbalancing the arguments used by my brethren. As set forth in United States v. Brecht, supra, only 13 states had commercial bribery statutes in

1960, the year before the Travel Act was enacted. United States v. Brecht, supra, 540 F.2d at 48. At least six states, as recently as 1976, did not even mention the word "bribery" in defining the offense now commonly called commercial bribery. Id. at 49 n. 6. In Louisiana, as in New York and most other states that proscribe commercial bribery, the offense prohibited is a misdemeanor. It is punishable in Louisiana by a maximum of imprisonment for six months and a fine of no more than $500, or both. LSA-R.S. 14:73. Because of the majority's holding, the added element of interstate travel escalates commercial bribery to a federal crime, and to a felony punishable by imprisonment for up to five years and a fine of up to $10,000, or both. 18 U.S.C. § 1952(a).

None of these factors is conclusive. Together, however, they weigh enough at least to balance, and, in my opinion, to tilt the scales to the other side. I would not read a criminal statute whose meaning is so ambiguous as justifying the interpretation placed on it by the majority and our colleagues of the Fourth Circuit.

Contrary to the footnote in the Government's Opposition at Page 5, if this court were to hold that either Title 18, Section 180 of the New York Penal Code, or Section 215 of Title 18 did not independently invoke the jurisdiction of the Travel Act, a vacation the judgment would be constitutionally mandated under ***Leary*** **v. *United States* 395 U.S. 6.**[1]

[1] Inasmuch as the indictment inextricably melded both statutes, dismissal would be required if either had been improperly invoked. As Judge Bryan recognized during the trial of Louis Pomponio, we cannot know whether the jury "came back on the right one or the wrong one, so if [any] of those is • • • improper • • •, then the conviction cannot be maintained." Transcript of proceedings in District Court, May 17, 1974. "[T]he proper rule to be applied

In the instant case the Government introduced evidence which sought to portray the witness Zneimer as the reciepient of payments from Ponponio-controlled corporations and that in consideration of same Zneimer approved construction advances in excess of that which the actual construction allegedly would have justified. This evidence was offered to support the underlying unlawful activity of commercial bribery, Section 180 of the New York Penal Code. The jury's general verdict of guilty in this case may have been premised on two distinct theories raised by the evidence. One theory may have been a conclusion that Zneimer was improperly influenced into making judgments adverse to the bank's interests as a result of the payments by the Pomponio corporations. In this instance, the underlying unlawful activity upon which the conviction would have been predicated would have been Section 180 of the New York Penal Code, commercial bribery. Conversely, another interpretation of the jury's verdict could have been premised upon the testimony of Zneimer and others that all his actions were proper insofar as the banks's interests were concerned, but that the underlying unlawful activity of Section 215 of Title 18 was established when the Petitioner, as counsel for the Pomponio corporations, allegedly assisted in the witness Zneimer receiving payments for extensions of credit to the Pomponio corporations.

It is undisputed, therefore, that there are two distinct theories of underlying activity that arose from differing constructions of the evidence as presented,

is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Yates v. United States, 354 U.S. 298, 312 (1957); United States v. Johns, 444 F.2d 58 (5th Cir. 1971).

and under a general verdict there is no way that one can assess upon which theory the jury returned its verdict. Therefore, unless both Section 180 of the New York Penal Code and Section 215 of Title 18 independently constitute unlawful activity within the meaning of the Travel Act, the judgment in this case must be set aside under *Leary* v. *United States,* 395 U.S. 6, 31-32 (1969).

The Travel Act is a criminal statute of overriding importance and no sound reason can be advanced for not resolving at this time the direct conflict which has emerged among the circuits as to whether commercial bribery can raise Travel Act jurisdiction. Contrary to the statements at Pages 7 and 8 of the brief in opposition, there is a "complete miscarrirge of justice" which does present "exceptional circumstances that justify collateral relief." See *Davis* v. *United States,* 417 U.S. 333 (1974) and this miscarriage of justice is that the Petitioner has served and completed a prison term that was imposed upon him in violation of due process of law, and to additional collateral punishment by the threat of possible disbarment arising from a judgment which has been unconstitutionally obtained and which is the subject of this collateral attack.

The instant petition, therefore, affords this Court the opportunity not only to resolve existing conflicts between the Second and Fourth Circuits and the dispute within the Fifth Circuit but allows this Court to prevent a further miscarriage of Justice which will accrue to this petitioner arising from the unconstitutional judgment that was imposed upon him.

REGARDLESS OF WHICH CONSTRUCTION OF THE TRAVEL ACT IS CORRECT, U.S. v. BRECHT, SUPRA, OR U.S. v. PILUSO, THE PETITIONER'S CONVICTION LACKS DUE PROCESS OF LAW UNDER THIS COURT'S RULING IN MARKS v. UNITED STATES, 430 U.S. 188 (1977); BOUIE v. CITY OF COLUMBIA, 378 U.S. 347, AND DOUGLAS v. BUDER, 412 U.S. 430.

The Government purports to respond to the first point which challenges the Constitutionality of the Travel Act due to vagueness and lack of notice of prohibitive conduct in the Petition for Certiorari, Pages 9-17, at Page 7 of its brief in opposition. The Government at no point in the Opposition attempts to suggest that this Court's rulings in *U.S.* v. *Nardello,* 393 U.S. 286 would have given any notice that Section 215 of Title 18, a conflict of Interest statute, which punishes the receiver and not the payor, would constitute bribery within the meaning of the Travel Act. The absence of any adjudicated cases on this issue, other than the instant one, shows that no one, including the Government, even thought of utilizing Section 215 of Title 18 as a basis for Travel Act jurisdiction.

The dissenting opinion in *United States* v. *Perrin,* supra, at Page 738 clearly points out that commercial bribery was never intended by Congress to be covered by the Travel Act. Judge Rubin stated:

> We cannot truly ascribe to Congress any intention either to include or exclude commercial corruption; Congress did not deal with the problem. As one scholar has said:
>
> > The difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what

> the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.

Judge Rubin pointed out that if the defendants were guilty they could be prosecuted under state law. He wisely counselled against expansive extension of federal jurisdiction when he stated:

> Each of them, if guilty of anything, can be prosecuted under state law. I would leave them and the record of the trial to state authorities; I would leave to Congress the amendment of the statute to make the mesh of the net smalled if it seeks to catch the commercially corrupt in the future.

The underlying unlawful activity in this case, Section 215 of Title 18, and Section 180 of the New York Penal Code, cannot by any fair reading of the Nardello case impute to anyone who might have read the Nardello decision notice that these two rather limited misdemeanors could be utilized as the bribery contemplated by the Travel Act. The expansive judicial construction which the Fourth Circuit has given to the Travel Act has thus denied the Petitioner due process of law, since he was not reasonably put on notice of what could constitute a violation of the Act under all of the cases cited in the Petition for Certiorari, Pages 9-17.

CONCLUSION

This continuing conflict over the jurisdiction of commercial bribery to raise Travel Act jurisdiction should be resolved at this time. The Petitioner should not be subjected to additional collateral punishment while this major issue goes unresolved when the resolution determines whether in fact the Federal Court had jurisdiction to even try the Petitioner. The continuing and ever-expanding conflict in the circuit courts of appeal and among district courts as to whether commercial bribery can raise Travel Act jurisdiction should be resolved by this Court at this time. If in fact no federal jurisdiction is properly raised, while this Court cannot correct the miscarriage of justice which occurred insofar as the serving of the Petitioner's sentence is concerned, it can prevent additional collateral punishment that accrues to him by virtue of this judgment.

Respectfully submitted,

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